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IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITIONER

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N.D. Cent. Code § 12.1-33.01	21
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Wis. Stat. § 756.02 20

Wis. Stat. § 939.62(1)(a) (2001) 19

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Secondary Authorities:

M. Love, Relief From the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (Hein 2006) ... 1, 12

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State of Wisconsin Office of the Governor, Application for Executive Clemency at II, Eligibility Rule 1 20-21

INTERESTS OF AMICI CURIAE[1]

1. The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with nearly 13,000 members, including both public and private defenders, active U.S. military defense counsel, law professors, and judges. NACDL's 90 state, local and international affiliate organizations comprise some 35,000 members in all 50 states and 27 other countries. The American Bar Association recognizes NACDL as an affiliate organization and accords it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts. To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the criminal justice system, NACDL files approximately 35 *amicus* briefs a year in state and federal appeals courts, including a least ten *amicus* briefs in this Court, on a variety of criminal justice issues affecting the vital interests of its members and their clients.

2. Families Against Mandatory Minimums (FAMM), founded in 1991, is a national, nonprofit, nonpartisan organization of 13,000 members whose primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by

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[1] No person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of this brief. The brief was not authored, in whole or in part, by counsel for either party. The charts in the Appendix were prepared by Margaret Colgate Love, author of RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (Hein 2006), and with substantial assistance from Sentencing Resource Counsel to the Federal Public and Community Defenders. Petitioner and respondent have consented to the filing of this brief; their written consents have been filed with the Clerk of the Court.

mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. Its affiliated Foundation carries out tax-exempt educational activities, including the regular filing of amicus briefs in this and other courts. FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation.

FAMM's interest in the instant case derives from its conviction that, to the extent mandatory minimum terms are required by law, they must be construed to reach no one other than as the legislature intended and the law plainly provides. FAMM is concerned that the Seventh Circuit's opinion reflects an unlawful extension of the reach of a severe mandatory penalty for a firearms possession offense, in that Congress has determined that the federal firearms disability should not apply to those individuals — such as petitioner Logan — who retain their civil rights and are deemed by their own states to be trustworthy enough to possess a firearm.

SUMMARY OF ARGUMENT

Under 18 U.S.C. § 922(g), a person "convicted" of a "crime punishable by imprisonment for a term exceeding one year" is prohibited from possessing a firearm. The Congress has expressed its policy that this federal firearms disability does not apply to individuals who are deemed by their own states, notwithstanding a criminal conviction, to be trustworthy enough to exercise the rights of a citizen and possess firearms. 18 U.S.C. § 921(a)(20). Under Section 921(a)(20), what constitutes a disqualifying conviction for purposes of Section 922(g) is to be determined under the law of the jurisdiction in which the proceedings were held, with deference given to the States' remedial measures.

In construing the governing federal law, the court below misapplied the choice-of-law and exemption clauses of Section 921(a)(20). The court instead held that some convicted misdemeanants, in states such as Wisconsin which do not take away any civil rights or restrict the possession of firearms on account of misdemeanor convictions, are forever barred by Section 922(g) from possessing a firearm, even though felons in those states are not subject to any such lifetime prohibition. The reading of the statute by the court below is contrary to Congressional intent and leads to an absurd result, as shown by a comprehensive survey of the 50 states and the District of Columbia, discussed at length in this Brief. Applying ordinary tools of statutory construction and considering the state laws that the Congress is presumed to have known when it enacted the federal firearms law, this Brief shows that it was the intention of the Congress in amending Section 921(a)(20) in 1986 to respect state laws that determine the issue whether persons convicted of a crime should be deprived of their ability to possess a firearm.

ARGUMENT FOR AMICI NACDL AND FAMM

A. The Seventh Circuit's Misinterpretation of Section 921(a)(20).

Under federal law, upon conviction for a "crime punishable by imprisonment for a term exceeding one year," a person may not possess a firearm. 18 U.S.C. § 922(g). A knowing violation of that prohibition is punishable as a felony. *Id.* §§ 924(a)(2), 3559(a)(3). A person who commits that federal offense and has a certain number and type of prior predicate convictions is labeled an "Armed Career Criminal" and is subject to a severe mandatory minimum and unlimited maximum sentencing. *Id.* § 924(e)(1). Every state but one deprives its citizens of some or all of the major civil rights – to vote, to serve on a jury, and to hold public office – upon conviction of a serious crime. Most

of those same states by their own laws also deprive their citizens upon conviction of any right to possess firearms. But more than a dozen states do not deprive their citizens of civil rights or of the opportunity to possess a firearm upon conviction for certain offenses, particularly for some or all less serious crimes. Through a complex definition of the phrase "crime punishable by imprisonment for a term exceeding one year," *id.* § 921(a)(20), Congress has expressed its policy that the § 922(g) federal firearms disability should not apply to those individuals who are deemed by their own states, notwithstanding a criminal conviction, to be trustworthy enough to possess firearms and otherwise to be entitled to participate as full members of the law-abiding community.

The court below held that some convicted misdemeanants, in states such as Wisconsin which do not take away any civil rights or restrict the possession of firearms for such offenses, are forever barred by § 922(g) from possessing a firearm even though felons in those states are not. A survey of the varied consequences of criminal convictions in the 50 states and the District of Columbia which is elaborated in this Brief shows the decision of the court below to be not only contrary to Congressional intent but also absurd in its application. Accordingly, *amici* urge the Court to hold that any judgment in a criminal case that does not result under local law in the loss of civil rights or eligibility to possess firearms is simply not a disqualifying "conviction" within the meaning of the federal gun control laws.

As originally enacted in 1968 and until 1986, Section 921(a)(20) excluded from the definition of "crime punishable by imprisonment for a term exceeding one year," *inter alia*, non-firearm offenses under state law that were "classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20) (1968). In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), this Court addressed whether a guilty plea

which had been "expunged" under state law (pursuant to statutory provisions that provided for such expunction upon completion of a probationary term, following a deferral of a formal judgment), nevertheless generated a "conviction" under Section 922(g), such that a corporation's license as a firearms dealer could be revoked because the former probationer was an officer of the company. *Id.* at 107-10. Following its earlier decision in *Lewis v. United States*, 445 U.S. 55, 60 (1980) (defendant's conviction was disqualifying under federal law even though subject to collateral attack on constitutional grounds), the *Dickerson* Court held that the defendant officer had been "convicted," within the meaning of Section 922(g), upon notation of his guilty plea and imposition of the probationary term even though no judgment had entered and state law viewed the conviction, if any, to have been nullified. *Id.* at 113-14 & n.9. The Court noted that "expunction under state law does not alter the historical fact of the conviction." *Id.* at 115. Based on the premise that "whether one has been 'convicted' within the language of the gun control statutes is necessarily ... a question of federal, not state law," *id.* at 111-12, the Court declared that "expunction of a state conviction was not intended by Congress automatically to remove the federal firearms disability." *Id.* at 115.

In so holding, the Court noted that "a rule that would give effect to expunctions under varying state statutes would seriously hamper effective enforcement" of gun-control laws because expungement statutes in those states that had enacted such laws "differ ... in almost every particular." *Id.* at 121. The Court recognized that Congress, in enacting the 1968 statutes, "took pains to avoid those very problems ... such as individualized federal treatment of every expunction law," by "us[ing] unambiguous language in attaching gun control disabilities to

any person 'who has been convicted' of a qualifying offense." *Id.* at 122.[2]

Section 921(a)(20) was amended in the Firearms Owners' Protection Act (FOPA) of 1986. P.L. 99-308, 100 Stat. 449, 450 (1986). The current version of Section 921(a)(20) retains the original limiting definition of "crime punishable by imprisonment for a term exceeding one year," *i.e.*, excluding "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less," but added a choice-of-law clause which, in response to *Dickerson*, provides that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[3] In a second added clause, Congress further limited the scope of what will be treated as a "conviction" under § 922(g) by deferring to the states' remedial mechanisms:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

18 U.S.C. § 921(a)(20). The scope of these exemptions is broad, as revealed in the obviously intended overlapping categories. Under this provision, a person whose civil rights have been

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[2] In this Brief, *amici* use the words "expunction" and "expungement" interchangeably, as this Court has done in its opinions. The latter term is found in most of the pertinent statutes and in more recent court decisions.

[3] *See Beecham v. United States*, 511 U.S. 368, 374 (1994) ("in enacting the choice-of-law clause, legislators may have been simply responding to our decision" in *Dickerson*).

"restored" by the state enjoys a removal of the federal firearm disqualification, unless the state expressly provides otherwise, whether or not the conviction in question has also been set aside, expunged or pardoned. Likewise, subject to the "unless" clause, the federal disqualification is also removed (because the person is no longer considered to have been "convicted") if the person has been pardoned or the conviction as been "expunged" or "set aside" under state law, even if some or all civil rights are *not* "restored." Similarly, a conviction that has been "set aside" no longer counts, even if the record has not been expunged, and an expunction of the conviction that does not involve setting it aside will also presumptively suffice. The court below relied on a strict reading of the word "restored" in this provision to justify the conclusion that otherwise covered convictions for which neither civil rights nor eligibility to possess a firearm was ever removed were nonetheless intended to be disqualifying. That conclusion is both illogical and incorrect.

The FOPA amendment to Section 921(a)(20) was intended to define a disqualifying conviction by reference to the law of the jurisdiction of conviction. The Senate first considered amending the statute as early as 1982, even before *Dickerson*:

> A third change relates to the definition of "crime punishable by imprisonment for a term exceeding one year," a conviction for which bars a citizen from possessing firearms. The first is a recognition that what constitutes a conviction shall be determined in accord with the law of the jurisdiction where the underlying proceeding[s] were held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create "open-ended" offenses, a conviction for which may be treated as misdemeanor or felony at the option of the court. Since the federal

> prohibition is keyed to the state's conviction, state law should govern in these matters. . . .
>
> [The bill] would also exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision as to pardons . . . relating to possession of firearms, but through oversight does not include such provision in 18 U.S.C. section 922, dealing with their purchase or receipt. This oversight has resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision that he may possess it. *Thrall v. Wolfe,* 503 F.2d 318 (7th Cir. 1974). This change would remove that anomaly. . . .

Federal Firearms Owners Protection Act, Rep. No. 97-476, to Accompany S. 1030, Comm. on Judiciary, U.S. Senate, 97th Cong. 2d Sess., 18 (1982).

The Senate again took up the issue in 1984, following *Dickerson v. New Banner Institute.* THE FEDERAL FIREARMS OWNERS PROTECTION ACT: HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 98th Cong. 1st Sess., 14-15, 21 (1984). Once again, the Senate spoke to using state law to define a "conviction." Federal Firearms Owners Protection Act, Sen. Rep. No. 98-583, to Accompany S. 914, 98th Cong., 2d Sess. 7 (1984). The Senate Report noted that the proposed amendment would "render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary." *Id.* at 7 n.16. As Senator Hatch, the Senate bill's floor manager, explained in 1985, the amendment to Section 921(a)(20), which became law the next year, would grant authority to the state jurisdiction that "prosecuted the individual to determine eligibility for firearm possession." 131 Cong. Rec. S8686 (June 24, 1985).

In *Beecham*, this Court explained that the choice-of-law provision, under which the law of the convicting jurisdiction defines a "conviction," and the "exemption clause," under which a restoration of rights, pardon, expungement, or set-aside undoes a conviction's effect, are indeed related: "we must look to whether Beecham's . . . civil rights were restored under federal law (the law of the jurisdiction in which the earlier proceedings were held). 511 U.S. at 371. "The first sentence and the first clause of the second sentence" of Section 921(a)(20) "define convictions, pardons, expungements, and restoration of civil rights by reference to the law of the convicting jurisdiction." *Caron v. United States*, 524 U.S. 308, 313 (1998) (citing *Beecham*). The exemption clause was intended to give effect to a jurisdiction's decision to relieve a person from the collateral consequences triggered by its conviction. Left within the definition of "conviction" are only those whom the convicting jurisdiction considers insufficiently trustworthy to exercise the rights of citizenship. As this Court has rightly observed, "Congress sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society," *Small v. United States*, 544 U.S. 385, 393 (2005) (citation and internal quotations omitted). The FOPA Congress deferred to *state* jurisdictions to determine, in the first instance, whether a citizen's criminal record indeed demonstrates such untrustworthiness.

The express Congressional policy of deference to the states under Section 921(a)(20) has the effect of limiting the cases where a person could be prosecuted in federal court for firearms conduct which the state's parallel law does not prohibit. The statute thus conforms to the general presumption of federal criminal statutory construction that Congress in legislating has not "'significantly changed the federal-state balance' in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000), quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) (discussing firearm possession provision of 1968 Omnibus Crime Control Act); *see also Jones*, 529 U.S. at 859-

60 (Stevens & Thomas, JJ., concurring, emphasizing this point). In this light, a "conviction," under 18 U.S.C. §§ 921, 922 and 924, as they incorporate state law, means – almost by definition, although the structure of subsection 921(a)(20) is not that of a dictionary (or ordinary statutory) definition – a conviction which is, at the time of the questioned gun possession, *disqualifying* under the law of that state. "Given the primacy of state law in the statutory scheme, it is bizarre to hold that the *legal* possession of firearms under state law subjects a person to sentence enhancement under federal law." *Caron*, 524 U.S. at 318 (Thomas, J., dissenting, with Scalia & Souter, JJ.) (original emphasis).

Ignoring the essence of the exemption clause, as informed by the choice-of-law clause, is the primary analytical flaw in the Seventh Circuit's rationale. The problem is not, as the Seventh Circuit put it, whether petitioner Logan was "misled by [a] state act that apparently freed him from the legal consequences of his battery convictions," *United States v. Logan*, 453 F.3d 804, 807 (7th Cir. 2006), but rather that Wisconsin has decided that individuals convicted of misdemeanor battery may lawfully exercise all the civil rights of citizens as well as possess a firearm, even when the punishment for battery can exceed two years of imprisonment. In effect, Wisconsin has chosen that persons such as petitioner Logan *are* sufficiently trustworthy to be allowed to exercise the rights of a citizen. The fact that he may also possess firearms under state law means that he is not excluded by the "unless" clause that follows. *See Caron*. Congress amended § 921(a)(20) in 1986 specifically to delegate that determination as to when a conviction should be disqualifying to the jurisdiction in which a prior conviction was imposed. The federal courts, bowing to the will of Congress, must therefore give controlling effect to the law of Wisconsin.

The statutory-construction canon that guided this Court in *Beecham, i.e.*, that "[t]he plain meaning that we seek to discern is the plain meaning *of the whole statute*, not of isolated

sentences," 511 U.S. at 372 (citations omitted; emphasis added), is fully applicable here as well. Every Member of the Court subscribed in *Caron* to the view that subsection 921(a)(20), even after FOPA, features problematic drafting which raises unanswered questions, and that in attempting to resolve such issues, the Court should presume that Congress did not intend "bizarre" results. *See* 524 U.S. at 315 (majority), 318 (dissent). Petitioner's brief shows that the decision of the court below produces precisely such results. Yet without even addressing the irrational results that follow from the Seventh Circuit's construction of Section 921(a)(20), that court's refusal to apply the choice-of-law and exemption clauses together as Congress plainly intended renders its construction untenable. Because petitioner's misdemeanor battery conviction did not cause him to lose either his civil rights or his firearms rights under Wisconsin law, he has not "been convicted ... of a crime punishable by imprisonment for a term exceeding one year," within the meaning of § 922(g) as explicated and limited by § 921(a)(20).

B. The Seventh Circuit's Application of Section 921(a)(20) in Logan's Case Criminalizes Firearm Possession That Is Lawful Under State Statutes.

In sixteen American jurisdictions, persons convicted of certain felonies, misdemeanors punishable by more than two years, or offenses classified as neither misdemeanors nor felonies, retain their civil rights after conviction. In twelve of these sixteen jurisdictions, those persons also retain the right to possess firearms, and in another, they regain their firearms rights automatically after a waiting period. The governing provisions are set forth in Appendix 1 to this Brief.[4] Under the Seventh

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[4] This and all related discussion in this Amicus Brief is based on detailed research of the 50 states and the District of Columbia undertaken by Sentencing Resource Counsel of the Federal Public and Community Defenders, starting with the invaluable published work of former U.S. (Cont'd)

Circuit's interpretation of Section 921(a)(20), in six of those thirteen jurisdictions, persons convicted of less serious offenses who do not suffer a loss of civil rights and who are not disabled by the state from lawful possession of a firearm, would nonetheless be required to seek some extraordinary relief, which is in fact or law largely unavailable, to satisfy Section 921(a)(20)'s exemption clause, while those convicted of more serious offenses, because they *do* lose civil rights upon conviction, would not. *Logan*, 453 F.3d at 806. In one of those jurisdictions, every person convicted of a crime, including the least culpable offenders whose firearms eligibility is never taken and more serious offenders who can regain firearms rights after the passage of time, would have to seek extraordinary and generally unavailable relief to satisfy the exemption clause, *because* they lose no civil rights. And in six other jurisdictions, less serious offenders who lose no civil or firearms rights would be required to obtain extraordinary relief in order to meet the exemption clause, *on the same footing* with more serious offenders who lose their rights.

Congress is presumed to have known of the surrounding legal landscape. The presumption that "Congress is aware of existing law when it passes legislation," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (citation omitted), is fully applicable where, as here, the Congress adopts (or defers to) state law as part of a federal statutory scheme. *See Goodyear*

(Cont'd)

Pardon Attorney Margaret Colgate Love, a leading scholar of post-conviction collateral consequences and remedies. *See* M. LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (Hein 2006), updated at *http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486* (Sentencing Project 2007). The results of this research are presented in a set of four detailed charts, labeled as Appendices 1 through 4 to this Brief, and lodged with the Clerk (due to impossibility of printing them in compliance with Rule 33 while retaining their usefulness) pursuant to Rule 32.

Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988).[5] The absurdity of requiring such individuals, who remain in full possession of their civil rights and gun rights under state law, to seek such relief (assuming it is available in a given state, which is usually not the case, *see* Appendices 1 and 3), while persons convicted of far more serious crimes are, in many jurisdictions, the beneficiaries of *automatic* restorations of civil rights and therefore within the exemption clause, *see* Appendix 2, is too obvious to merit serious consideration as having been within the intendment of Congress.[6]

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[5] In *Goodyear*, the Court addressed a federal statute, 40 U.S.C. § 290, under which state worker compensation laws applied to federal enclaves within a state in the same manner as those laws would apply to private employers in that state, to determine whether enhanced award provisions in certain states would apply in federal enclaves. 486 U.S. at 183-84. Ohio, whose statute was before the Court, as well as other states, provided additional awards to injured workers based on an employer having engaged in specific forms of misconduct and/or violations of identified safety violations. *Id.* at 184. The Court held that the Congress would be deemed to have been aware of such statutory provisions when it enacted the federal statute deferring to state worker compensation laws:

> We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts. In the absence of affirmative evidence in the language or history of the statute, we are unwilling to assume that Congress was ignorant of the substantial number of states providing additional workers' compensation awards when a state safety regulation was violated by the employer. Indeed, Congress appears to have recognized the diversity of workers' compensation schemes when it provided that workers' compensation would be awarded to workers on federal premises "in the same way and to the same extent" as provided by state law. . . .

Id. at 184-85 (citation omitted).

[6] As set forth in Appendix 2, many states have provisions that restore civil rights to most, if not all, convicted persons upon completion (Cont'd)

In enacting Section 921(a)(20), Congress is presumed to have known, and taken into consideration, that Wisconsin – as well as twelve other states and the District of Columbia – authorize more than two years of imprisonment for certain offenses which those states nevertheless classify as "misdemeanors,"[7] and that two states (Maine and New Jersey)

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of a prison sentence or other criminal sanction, plus, in some instances, an additional waiting period. The Seventh Circuit's reading of Section 921(a)(20) means that persons whom individual states believe should be deprived of their civil rights upon conviction but who obtain automatic, or virtually automatic, restorations of civil rights may invoke the exemption clause of Section 921(a)(20). Persons such as petitioner Logan, on the other hand, who are convicted of offenses that their own state deems *insufficiently* serious to warrant a deprivation of civil rights in the first instance, however, must seek some form of unavailable or highly discretionary relief from the conviction itself in order to attain the benefits of the federal exemption clause.

[7] *See* Colo. Stat. §§18-1.3-501(1), (1.5)(a), 18-1.7(a), (3) (misdemeanor assault in the third degree against police officer, firefighter, or public mental worker subject to 48 month statutory maximum); Colo. Stat. §§ 18-3-412(2), 18-1.3-501(1), (3) (habitual sex offenders against children punishable by mandatory six-year term for misdemeanor conviction on second or subsequent conviction); Conn. Stat. §§ 53a-40a(b), 53a-35a (Class A misdemeanor committed by "persistent offender of crimes involving bigotry and bias" subject to up to five years of imprisonment; Conn. Stat. § 53a-40d(b) (Class A misdemeanor committed by "persistent offender of crimes involving assault, stalking, trespass, threatening, harassment, criminal violation of a protective order or criminal violation of a restraining order" subject to up to five years); D.C. Stat. § 22-404(d) (certain repeat stalking offenses are punishable by up to three years); Fla. Stat. § 775.0845 (1994) (conviction of misdemeanor committed while wearing mask punishable by maximum of five years of imprisonment); Fla. Stat. § 775.085 (1997) (first-degree misdemeanor under "hate crime" statute punishable by maximum of five years); Ind. Code § 35-50-2-10(a)(2), (f) (Class A misdemeanor "habitual substance offender" punishable by additional term of three to eight years); Iowa Stat. § 903.1(1)
(Cont'd)

do not classify crimes as either "misdemeanors" or "felonies."[8] Indeed, it would have made no sense for Congress to include a provision specifically addressing misdemeanors punishable by

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("aggravated" misdemeanor punishable by two years); Iowa Stat. § 901A.2 ("sexually predatory offense" classified as misdemeanor punishable by twice maximum sentence and up to 10 years of imprisonment for offender with two prior convictions); Iowa Stat. § 903B.2 (2006) (revocation of supervision following conviction for certain misdemeanor sex offenses punishable by two years on first revocation and five years on second revocation); La. Rev. Stat. §§ 3:4229(F), 14:40.2(B)(6)(a), 14:40.3(C)(2), (3); 14:56.2(C), 14:95.1.1, 14:125.2; 14:134.1, 40:695(B)(1), 51:2013 (numerous misdemeanor offenses punishable in excess of two years of imprisonment); Md. Code, Criminal Law §§ 3-203, 3-204, 3-605, 3-802, 3-804, 5-620, 6-107, 8-401, 8-516 (numerous misdemeanors punishable by between three and ten years); Mass. Gen. Law 279, § 23 (two and one-half year maximum sentence for misdemeanors); Neb. Rev. Stat. §§ 28-105(1), 28-106(1), 28-111, 28-115(1), 28-323 (certain misdemeanors committed for discriminatory reasons or against pregnant woman punishable by up to five years); N.H. Rev. Stat. § 651:6(III)(b) (with aggravating circumstances, misdemeanors punishable by maximum of five years); 18 Pa. Const. Stat. § 106 (first-degree misdemeanor punishable by maximum of five years); S.C. Code §§ 16-1-20(A), 16-1-100(A) (over 130 misdemeanors subject to three-year maximum term of imprisonment).

[8] 17-A Me. Rev. Stat. §§ 4(1), 1252(1)-(2), (4) (all offenses other than murder classified as Class A, B, C, D or E crimes; Class D and E crimes punishable by imprisonment in county jail only but statutory maximum increased from less than one year and no more than six months respectively to five years and less than one year respectively for offenses committed with dangerous weapon); N.J. Stat. Ann. §§ 2C:1-4, 2C:43-1, 2C-43-6(a), 2C:43-7(a)(4)-(5) (no classification of felonies and misdemeanors, but as first, second, third and fourth degree crimes and "disorderly persons" offenses; fourth-degree crimes punishable by maximum of 18 months but subject to extended term of up to five years based on aggravating factors). Historically, prior to 1979, New Jersey referred to all crimes as "misdemeanors," though more serious offenses were classified as "high misdemeanors."

more than two years of imprisonment if it had not been aware that many jurisdictions allow such sentencing for certain offenses labeled "misdemeanors."

The details of the availability in each state of the remedies mentioned in subsection 921(a)(20)'s exemption clause are elaborated in Appendix 3, disclosing the availability of expungement, set aside and pardon, as defined "by reference to the law of the convicting state." *Caron v. United States,* 524 U.S. 308, 313 (1998). To be included in one of these columns, the mechanism must operate on a "conviction," which likewise is defined "by reference to the law of the convicting state." *Id.*

Expungement of some subset of existing convictions – whether tiny or broad – is available in twenty-six jurisdictions, but is only available for at least some qualifying convictions (as defined in Section 924(e) and not exempt under Section 921(a)(20)(B)) in nine jurisdictions (Arkansas, Kansas, Minnesota, New Hampshire, New Jersey, Ohio, Rhode Island, Utah, Washington). Included in the "Expungement" column of Appendix 3 is any statutory procedure that results in what the state legislature or the state courts call an "expunction" or "expungement" which is available with respect to an existing adult conviction. The category relies on the terminology that the state itself uses rather than the effect of the procedure, because the effect of an "expungement" varies quite widely from state to state. Similarly not included are procedures for "sealing" records or "vacating" convictions for certain purposes that may have an effect similar or even identical to another jurisdiction's expungement procedure, unless the jurisdiction itself calls the procedure an "expunction" or "expungement."[9] Expunction also

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[9] *Compare, e.g., State v. Keyes*, 131 Wash. App. 1042 (Wash. Ct. App. 2006) (Table) (a "washed out" conviction under Wash. Stat. § 9.94A.640 is not an expungement), *review denied*, 149 P.3d 377 (Wash. 2006) *with People v. Acuna*, 92 Cal. Rptr. 2d 224, 226 (Cal. Ct. App. 2000) (a "set aside" conviction under Cal. Penal Code (Cont'd)

may be available only in conjunction with or after a pardon, a state-labeled "set aside," *see* next paragraph, or a civil rights restoration, *see* Appendix 2 ("Mechanisms for Restoring Civil Rights Lost Upon Conviction"). If expungement is available only in conjunction with or after one of these other mechanisms, this fact is so noted, but the remedy then is not, of course, a distinct method of satisfying the exemption clause.

Eleven jurisdictions (Alaska, Arizona, California, Idaho, Kentucky, Louisiana, Michigan, Nebraska, Oregon, Texas, and Washington) have what they call a "set aside" procedure for certain convictions for which judgment has entered and are otherwise valid. These are listed in the "Set Aside" column of Appendix 3.[10] Notably, of the 13 jurisdictions which are affected by the rationale of the decision below only Louisiana and Nebraska even have a "set aside" procedure.

Finally, in Appendix 3, the "Pardon" column is limited to executive pardons which are granted by the Governor or, if the

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§ 1203.4 is an expungement). Several jurisdictions permit expunction when charges have been dismissed or not prosecuted; when the person was acquitted; when the conviction was erroneous; when the person was adjudicated delinquent; or when the charge was dismissed upon successful completion of probation and judgment never entered. When expungement is available only in one or more of those situations, but not for an existing adult conviction, it is not included in this column of Appendix 3.

[10] Not included on Appendix 3 as "set asides" are procedures for appeal or collateral attack, available in every jurisdiction, which may reverse, vacate or invalidate a conviction. Nevertheless, *amici* are confident that Congress intended convictions "set aside" in that rather different (and more common) sense to be exempt under § 921(a)(20) as well. Likewise, *amici* have omitted from Appendix 3 the numerous remedies in the states, some of them labeled as "expungements" or "set asides," for ameliorating the effects of prior juvenile adjudications. This is not to suggest that these records, once set aside and/or expunged, are not excepted by § 921(a)(20) as well.

law of the jurisdiction so provides, by a board within the executive branch. Not included are executive procedures for restoring civil rights that are not called "pardons." (A separate chart, entitled "Mechanisms for Restoring Civil Rights Lost Upon Conviction," lodged as Appendix 2, sets forth mechanisms for restoration of civil rights other than in conjunction with a pardon, "set aside," or expunction, whether by operation of law or available from a court, the governor or an executive board.) If pardon is not available for some offenders, this fact is noted. For each jurisdiction, it is noted whether pardons are, in practice, reasonably available, infrequent or rarely granted. Pardons are reasonably available in only twelve jurisdictions.

Restoration of civil rights – a separate category under § 921(a)(20) – is defined, like the other exemptions, by reference to the law of the convicting jurisdiction. *See Caron*, 524 U.S. at 313. Several states, including Wisconsin, at issue here, and Iowa, at issue in *Dickerson*, have adopted the common sense view that defendants who do not lose rights need not have them "restored" in order to avoid a state-imposed disability. *See, e.g.*, Wis. Stat. §§ 304.078(2), 973.09(5); Note, 1998 Wisc. Legis. Serv., Act 289 (1997 A.B. 747) (West) ("certificate of discharge" is required as evidence that the "person is restored to his or her civil rights" when a felon, but not a misdemeanant, is discharged from probation, because "persons on probation for misdemeanors do not lose any civil rights, which obviates the need for a discharge document to be filed on their behalf"); Iowa Code §§ 907.3(1), (3), 907.9(4); Op. Atty. Gen. (Wornson), Sept. 10, 1975 (court must recommend to the governor whether or not civil rights should be restored when a person receives a suspended sentence because such a person loses his civil rights, but no restoration of rights is necessary when a person is discharged after a deferred sentence (the procedure at issue in *Dickerson*) because he suffers no loss of civil rights) (on file with *amici*); *Blackmon v. State*, 598 S.E.2d 542, 544-45 & n.13 (Ga. Ct. App. 2004) (a person convicted of a felony pursuant to a *nolo contendere* plea cannot be prosecuted under state felon-

in-possession statute because such a plea does not effect "any civil disqualification of the defendant to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of this state") (citing Ga. Code Ann. § 17-7-95(c)); *Martin v. State*, 791 So. 2d 1115, 1116 (Fla. Dist. Ct. App. 2000) (defendant whose prior felony did not cause a loss of civil rights cannot be denied post-trial bail under statute that permits detention only when "civil rights have not been restored" for prior convictions).

The Seventh Circuit's interpretation of § 921(a)(20) would effectively overrule those common sense determinations, because it would require those who do not lose civil rights nonetheless to have them "restored" in order to satisfy the exemption clause. It would also nullify the determination by thirteen jurisdictions – Colorado, Connecticut, the District of Columbia, Florida, Iowa, Louisiana, Maine, Nebraska, New Hampshire, North Dakota, South Dakota, Vermont, and Wisconsin – that certain offenders retain all three civil rights and may possess firearms notwithstanding conviction of a misdemeanor punishable by more than two years, of certain felonies, or of an offense not classified as a felony or a misdemeanor.[11] *See* Appendix 1. Whether characterized as unjust, odd, or patently absurd, there can be no doubt that this result is exactly what Congress intended to avoid when it amended § 921(a)(20) in response to *Dickerson* in 1986.

Take, for example, Wisconsin, the state in which Petitioner was convicted. Prior to February 1, 2003, Wisconsin law increased the statutory maximum for misdemeanors from nine months to three years if committed by a "repeater." *See* Wis. Stat. § 939.62(1)(a) (2001), *amended* by Wis. Act. 109 (S.B. 1), sec. 562 (eff. Feb. 1, 2003). Convictions under the "repeater"

[11] In North Dakota, firearms rights are automatically regained after a waiting period. In the other twelve jurisdictions, firearms rights are not lost. *See* App. 1.

statute thus fell outside of 18 U.S.C. § 921(a)(20)(B), which excludes from the federal definition of "conviction" any offense classified by state law as a misdemeanor if punishable by a term of imprisonment of two years or less.[12] The vast majority of those "repeater" convictions did not, however, result in the loss of any civil rights. To the contrary, the ability to exercise civil rights in Wisconsin can be lost only upon a felony conviction, or a conviction of misdemeanor bribery or misdemeanor violation of public trust. *See* Wis. Const. art. 13, § 3(2) (right to hold office lost by conviction of felony or misdemeanor violation of public trust); Wis. Stat. §§ 6.03(1)(b) (right to vote lost by conviction of felony or misdemeanor bribery), 756.02 (right to serve on jury lost by felony conviction). A misdemeanant is also not prohibited from possessing a firearm under state law. *See* Wis. Stat. § 941.29(1), (2).

Petitioner, who was a misdemeanant sentenced as a "repeater," did not thereby lose any civil or firearm rights. By not removing civil rights or firearms qualification from such persons (except those convicted of bribery or a violation of public trust), the Wisconsin legislature signaled clearly its view of the appropriate consequences of this class of convictions. Under the Seventh Circuit's interpretation of "civil rights restored," however, federal courts would be required to treat Wisconsin misdemeanants as harshly as felons – a result directly at odds with Congressional policy to respect state law.

Even more irrational, misdemeanants in Wisconsin, unlike felons, would have no way, in the real world, to satisfy any part of § 921(a)(20)'s exemption clause under the Seventh Circuit's interpretation. Misdemeanants are not ordinarily considered for pardon, *see* State of Wisconsin Office of the Governor,

[12] Wisconsin amended its "repeater" statute effective February 1, 2003. *See* Wis. Act. 109 (S.B. 1), sec. 562 (eff. Feb. 1, 2003). Since then, no misdemeanor in Wisconsin, including misdemeanor battery, is punishable by a term of imprisonment of more than two years even if committed by a "repeater." *See* Wis. Stat. § 939.62(1)(a).

Application for Executive Clemency at II, Eligibility Rule 1 ("Pardons, commutations and reprieves are available for felonies only, not misdemeanors," which may be waived only if an applicant can "demonstrate that there are extraordinary circumstances showing that you should be eligible to apply even though you seek executive clemency for a misdemeanor").[13] Adult misdemeanants have no expungement remedy, Wis. Stat. § 973.015, and Wisconsin has no procedure to "set aside" a conviction at all.[14] The hyperliteral reading of "civil rights restored" by the Court below thereby establishes a barrier to lawful firearms possession, at odds with state policy, that is harsher for Wisconsin misdemeanants than for felons.

Reading "civil rights restored" to require a ritualistic loss and restoration, as did the Seventh Circuit, leads to patently unfair results in numerous other jurisdictions. As in Wisconsin and Florida (*see* Appendix 1, at 5, 18), more serious offenders in Iowa, Louisiana, North Dakota and South Dakota would be able to satisfy the exemption clause when less serious offenders could not. Each of those jurisdictions restores civil rights automatically or nearly automatically to those who lose civil rights as a result of a conviction. *See* Iowa Executive Order No. 42;[15] La. Const. art. 1, §§ 10(C), 20, art. 4, § 5(E)(1); La. Rev. Stat. §§ 15:572(B)(1), (C), (D); N.D. Cent. Code §§ 12.1-33.01, 12.1-33-03(1); S.D. Codified Laws §§ 24-5-2, 24-15A-7. Naturally, restoration procedures do not exist for less serious offenders (misdemeanants in Iowa and Louisiana, probationers in North and South Dakota) because they lose no civil rights.

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[13] Available at http://www.wi-doc.com/index_adult.htm.

[14] Belying the Seventh Circuit's castigation of petitioner for having not sought expunction or pardon of his misdemeanor conviction, 453 F.3d at 809, such relief was thus not even available to him.

[15] Available at http://www.governor.iowa.gov/administration/docs/vilsack-eo-42.pdf.

See id. Under the Seventh Circuit's interpretation, this means that less serious offenders would have to obtain an expungement, set aside or pardon in order to satisfy the exemption clause, while more serious offenders would not. That result, irrational on its own, is materially unfair in light of the fact that such procedures are in fact and law largely unavailable. In Louisiana, a "set aside" (and possible expungement thereafter) is available only if the court defers imposition of the sentence, and pardons are rarely granted. Appendix 1, at 8, 21. In Iowa, North Dakota and South Dakota, expungement and set aside are not available at all. *Id.* at 6, 13-14, 20, 29-31. In Iowa, pardons are infrequent, in North Dakota they are rarely granted, and in South Dakota, they are granted at best about half the time. *Id.*

Maine chooses not to classify crimes as "felonies" or "misdemeanors." *See* 17-A Me. Rev. Stat. § 4(1). As a result, not even the most minor offenses can fit within § 921(a)(20)(B), which applies only to offenses that are "classified by the laws of the State as a misdemeanor." They cannot fit within the Seventh Circuit's interpretation of the exemption clause either because Maine does not remove civil rights for any conviction. *See* Appendix 3, at 9, 23-24. Under the Seventh Circuit's interpretation, then, no one – including the least culpable offenders for whom firearms rights are never taken and more serious offenders who can regain firearms rights after five years, *see* 15 Me. Rev. Stat. § 393(2) – could satisfy the exemption clause unless they obtained an expungement (nonexistent in the state), a set aside (also unavailable) or a pardon (rare). *See* Appendix 1, at 9, 23-24. Here, again, the result is contrary to state law, and thus inconsistent with congressional intent.

In Vermont, persons sentenced to probation do not lose civil rights or firearms rights, and thus would need to obtain an expungement (unavailable unless the court defers sentencing and "strikes" the conviction, which is possible only in very limited circumstances), a "set aside" (nonexistent) or a pardon

(rarely granted) in order to satisfy the Seventh Circuit's interpretation of § 921(a)(20)'s exemption clause. *See* Appendix 1, at 14, 31-33. Under the Seventh Circuit's interpretation, probationers who lost no rights would be on the same footing with those sentenced to prison, contrary to state law. *Id.* Several other jurisdictions likewise would be forced to expunge, "set aside," or pardon non-disabling convictions in order to ensure that federal courts would give effect to their determinations about which citizens may possess firearms. *See, e.g.*, Appendix 1, at 3-4, 12-13 (Colorado, Connecticut, District of Columbia, Nebraska, and New Hampshire). To require such action flatly contradicts congressional intent, and represents the epitome of absurdity, precluding a strictly literal construction of the statute.

Thus, the state laws of which the Congress is presumed to be aware, particularly those of the thirteen jurisdictions in which, like Wisconsin, a person convicted of a misdemeanor punishable by more than two years, a less serious felony, or a crime not classified as either a misdemeanor or a felony loses neither civil rights nor firearm rights – those jurisdictions to which Section 921(a)(20)(B) directly speaks – both informed and limit Section 921(a)(20)'s cabining of the adopted-state-law definition of a "conviction." Congress *cannot* be deemed to have intended to require such persons to seek expungement or a pardon to invoke the exemption clause, when there is no *disabling* conviction from which they would need to be exempted in the first instance.

Indeed, as part of what the Congress must be presumed to have known in adopting the FOPA amendment to Section 921(a)(20) in 1986, expunction of valid existing adult convictions is available, if at all, in only nine jurisdictions, a "set aside" of such a conviction is available in only eleven jurisdictions, and executive pardons are reasonably available to convicted persons in only twelve states. Appendix 3. While the Congress could have concluded that a person who has been convicted of a *qualifying* crime in a jurisdiction that has

determined the offense of conviction sufficiently serious to warrant depriving the convicted person of firearms rights should obtain such discretionary post-conviction relief as may be available in order to invoke the exemption clause, it is an utterly irrational reading of the statute to impose such onerous, and in many cases, impossible, burdens on individuals who have *not* received disqualifying convictions. Moreover, Congress cannot reasonably be deemed to have intended to burden the Nation's Governors in this novel way, demanding their attention to a flood of otherwise unnecessary pardon applications in relatively minor cases. It is, of course, all the more so when persons convicted of far more serious offenses benefit from automatic, or nearly automatic, civil rights restoration provisions.

Finally, the Seventh Circuit's attempt to justify its reading of Section 921(a)(20) because, in that court's view, "[m]ost states would call the batteries of which Logan was convicted felonies and deprive the offender of civil rights," 453 F.3d at 807, is both factually baseless and practically flawed. It is unfounded because, as the Seventh Circuit itself (correctly) recognized "[t]he 1986 legislation makes the effect of a conviction turn *on state law*." *Id.* at 806-07 (emphasis added). The primacy of each individual state's law is written into the federal statute, and the federal courts are assigned no role of weighing the relative "seriousness" (or lack thereof) of any particular conviction – particularly where, as here, the state, while authorizing a longer term for a misdemeanor than is perhaps authorized in other states (until February 1, 2003, when the term was reduced to two years), has *also* determined that the defendant, upon conviction, should *not* suffer the loss either of *any* civil rights or of the right to possess a firearm. That is the determinative factor under the statute. Otherwise, each federal judge, in determining whether a particular state conviction should be considered under Section 921(a)(20) would be authorized to engage in an *ad hoc* valuation of the relative seriousness of the acts for which the defendant was convicted in state court, which quite obviously

is unacceptable under the terms of this federal statute.[16] The analysis is also practically flawed: Wisconsin's treatment of Logan's offense is well within the mainstream of state laws on battery crimes. Appendix 4.[17]

For all these reasons, in addition to those presented by petitioner himself and by his other amici, petitioner Logan was not, on account of his prior record as a misdemeanant in Wisconsin, a person who stood "convicted" within the meaning of the federal firearms law.

CONCLUSION

Fundamental statutory construction rules, *i.e.*, that statutes are to be construed as a whole and that the Congress is presumed to know the law when it enacts a statute, dictate the resolution of the present dispute over a federal statute's meaning and

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[16] Indeed, that the 1986 amendment to § 921(a)(20) was intended to overrule *Dickerson* itself should bar the inquiry suggested by the Seventh Circuit's opinion. As noted at the outset of this brief, the *Dickerson* holding allowed a state offense to be treated as a prior conviction despite a state expunction — that is, despite a state determination that the defendant should not stand convicted of a qualifying offense under Section 921(a)(20). The Seventh Circuit's post-amendment evaluation of Logan's conviction superimposes a *federal* analysis on a state's treatment of state criminal offenses and convictions.

[17] As of the date of this Brief, the batteries of which petitioner Logan was convicted would be classified as misdemeanors in 48 jurisdictions (including Wisconsin). *See* Appendix 4. In 45 of those (including Wisconsin), the offense would not be punishable by more than two years' imprisonment and would thus be excluded under 18 U.S.C. § 921(a)(20)(B). *Id.* In addition to Wisconsin (at the time of Logan's conviction but not today), three jurisdictions (Connecticut, Maryland and Massachusetts) designate a third conviction of simple battery as a misdemeanor with a statutory maximum of more than two years. *Id.* Only in Florida, North Carolina, and South Dakota would a fourth conviction of simple battery constitute a felony. *Id.*

application. The Seventh Circuit itself admitted that its construction of Section 921(a)(20) allows for "disparate treatment," if not downright irrational results, but refused to invoke the prohibition on absurd statutory constructions, viewing it as only a "poorly conceived statute." 453 F.3d at 806, 809. *Amici* NACDL and FAMM ask neither that the Court rewrite the statute nor that the Court substitute its judgment for that of the Congress. Rather, they ask that the Court apply ordinary tools of statutory construction, together with an understanding of the laws that the Congress is deemed to have taken into consideration, to determine that the Congress intended Section 921(a)(20) to respect and safeguard state laws that determine whether convicted persons should be deprived of eligibility to possess a firearm. Respect for those laws requires rejection of the Seventh Circuit's interpretation of the federal firearms statute.

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